NOT ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF THE APPELLEE

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BRIEF OF THE APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi (App. 106) is reported at 330 So.2d 268. The opinion of the Chancery Court of Hinds County, Mississippi (App. 99) is not reported.

JURISDICTION

This action was commenced in the Chancery Court of Hinds County, Mississippi, pursuant to Section 10121.1, Mississippi Code of 1942 (now codified as Section 27-65-47, Mississippi Code of 1972, Annotated, Volume 9, page 52) seeking a refund of privilege taxes assessed against appel-

lant Complete Auto Transit, Inc. The decree of the Chancery Court upholding the assessment was entered on August 6, 1974 (App. 102).

Upon timely appeal, the order of the Chancery Court was affirmed by the Supreme Court of the State of Mississippi, which held that the Mississippi sales tax statute was constitutionally valid as applied to Complete Auto Transit, Inc. The opinion and judgment (App. 106) of the Mississippi Supreme Court were filed on April 13, 1976.

The Notice of Appeal to this Court (App. 113) was filed in the Mississippi Supreme Court on June 9, 1976. This appeal was docketed on July 12, 1976. Probable jurisdiction was noted on October 4, 1976. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257 (2).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal is predicated upon the Interstate Commerce Clause of the Constitution of the United States (Art. I, § 8, cl. 3), which provides that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

The following statutes were in effect at all times relevant to this litigation and formed the basis for the assessment of the tax at issue.

Section 10105 of Mississippi Code of 1942 (now codified as Section 27-65-13, Mississippi Code of 1972, Annotated, Vol. 9, page 12), which reads as follows:

> There is hereby levied and assessed, and shall be collected, *privilege* taxes for the *privilege* of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections. (Emphasis added.)

Section 10109 (2), Mississippi Code of 1942 (codified as Section 27-65-19 (2), Mississippi Code of 1972, Annotated, Vol. 9, page 20), provided[1] in part as follows:

> Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire *between points within this State*, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent (5%) of the gross income of such business. . .[2] (Emphasis added.)

In addition to the statutes cited by the appellant, the following statute is also applicable. Section 27-65-31, Mississippi Code of 1972, Annotated (§ 10117, Mississippi Code of 1942), provides in part:

> Any person liable for a privilege tax levied and assessed by sections 27-65-17 [§ 10108, Mississippi Code of 1942], 27-65-19 [§ 10109, Mississippi Code of 1942], 27-65-23 [§ 10111, Mississippi Code of 1942] and 27-65-25 [§ 10112, Mississippi Code of 1942] of Mississippi Code of 1972, shall add the amount of

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1. The statute was amended effective as of August 1, 1972, so as to exclude the transportation of property. Mississippi Laws 1972, Chapter 506. The statute as amended appears in Mississippi Code of 1972, Annotated, Supp. to Vol. 9, pages 14-15.

2. The full text of the statute is set out in Appendix A to this Brief.

such tax due by him to the sales price or gross income, and, in addition thereto, shall collect, insofar as practicable, the amount of the tax due by him from the purchaser at the time the sales price or gross income is collected. However, the provisions of this section shall not apply to charges for communication services taxable under section 27-65-19, the rates for which were on January 1, 1952, subject to the jurisdiction of the Mississippi public service commission, except to the extent the rates of tax imposed were not included as a part of the cost of furnishing services in fixing rates and charges.

* * *

It shall be unlawful for any person, who is liable for a privilege tax levied by sections 27-65-17, 27-65-19, 27-65-23 or 27-65-25 of the Mississippi Code of 1972, to fail or refuse to add to the sales price and collect, insofar as practicable, the amount of the tax due by him on each sale, except where the tax was included in the cost of furnishing service when said cost was a factor in the fixing of rates and charges.

QUESTION PRESENTED

The following question is presented by this appeal:

May the State of Mississippi levy a sales tax on intrastate waybills for services performed exclusively within the state even though the activity is related to or connected with interstate commerce?

STATEMENT OF THE CASE

This case involved an assessment for state sales taxes levied by the Mississippi State Tax Commission upon the appellant, Complete Auto Transit, Inc. The appellant, a Michigan corporation, had contracted with General Motors Corporation to haul certain motor vehicles from Jackson, Mississippi, to various General Motors dealers located within the State of Mississippi.

The State Tax Commission pursuant to its authority under Sections 10105 and 10109 (2), Mississippi Code of 1942,[3] made an assessment upon the gross receipts earned by the appellant corporation for transporting various vehicles from Jackson, Mississippi, to points within the State of Mississippi (App. 42).

The subject vehicles were initially shipped by rail from a General Motors assembly plant located outside of the State of Mississippi on a bill of lading naming General Motors as consignor and General Motors, in care of Complete Auto Transit, Inc., Jackson, Mississippi, as consignee. No sales tax was levied by the State of Mississippi upon this particular transportation activity.

The appellant maintained a yard adjacent to the railroad at Jackson, Mississippi, where the vehicles were stored and where an office, together with facilities for servicing the appellant's trucks were maintained (App. 78-79). Upon arrival at the Jackson, Mississippi, railhead ramp, the shipping documents were stamped "Received General Motors Corporation, by Complete Auto Transit" (App. 18-19, 23-24, 95-96). After inspection of the vehicles for dam-

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3. Effective August 1, 1972, § 10109 (2) was amended to exclude the transportation of property. See General Laws of Mississippi 1972, Chapter 506.

age, the appellant prepared separate waybills showing General Motors, Jackson, Mississippi, as shipper and consignor, the description of the vehicles, and the name of the consignees (General Motors dealers in cities other than Jackson) (App. 18-19, 25-26, 67-68, 96).

The transportation contracts between General Motors and the railroad and between General Motors and the appellant were negotiated separately (App. 64, 68). The charges paid by General Motors to the appellant for the transportation of vehicles from Jackson, Mississippi, to various dealers within the state were readily separable from charges for transporting vehicles from Jackson outside the State of Mississippi. Likewise, the transportation charges paid the railroad company were in no way connected to those paid by General Motors to the appellant (App. 68).

The Mississippi State Tax Commission made no assessment upon the appellant for the transportation of motor vehicles from Jackson, Mississippi, to points outside of the state. Also, there was no tax levied upon the railroads for transporting the vehicles into Jackson from outside the State of Mississippi. The taxes that are at issue in this case were restricted to the transportation of motor vehicles from Jackson, Mississippi, to points within the State of Mississippi itself (App. 34-36). For the period August 1, 1968, through July 31, 1972, the Mississippi State Tax Commission assessed the appellant, Complete Auto Transit, Inc., sales taxes in the amount of $167,375.30 (App. 10, 12, 37).

The assessment at issue in this case was appealed to the Chancery Court of Hinds County, Mississippi, with a decree affirming the assessment being entered on August 6, 1974 (App. 99-103). On April 13, 1976, the Supreme

Court of the State of Mississippi in a unanimous decision affirmed the assessment (App. 106-111). The case is now reported at 330 So.2d 268.

SUMMARY OF THE ARGUMENT

I. General Motors shipped automobiles by rail on a bill of lading showing General Motors Assembly plant, Atlanta, Georgia, as consignor, to themselves, General Motors, Jackson, Mississippi, as consignee, in care of Complete Auto Transit.

No Mississippi sales tax was levied on the transportation charges for any part of that interstate rail shipment.

Complete Auto, the appellant herein, is a foreign corporation domiciled in Jackson, Mississippi, engaging in the business of transporting automobiles by truck on waybills showing General Motors, Jackson, Mississippi, as shipper, to a consignee-dealer located either in Mississippi or in a neighboring state.

The Mississippi Tax Commission levied a five percent sales tax on the gross receipts of the transportation charges received from their intrastate shipments, from General Motors as shipper in Jackson, Mississippi, to a dealer destination, also in Mississippi. *No tax was imposed on the interstate shipments going from Jackson, Mississippi, to a destination in another state.* No apportionment is therefore at issue.

The Mississippi sales tax law provides for the imposition of the tax on the gross receipts or gross income of the charges for the transportation service performed exclusively within the state.

The incidence of the sales tax is obviously the performance of the intrastate commercial activity since it is not due until the sale of the goods or service has been performed. It is the event which is the "incidence." If the event is not performed, no tax is due.

The sales tax is applied only to intrastate transactions performed totally and exclusively within the state. It is not a condition precedent to engaging in business; neither is it a license to engage in business.

It is obviously not a tax on the privilege of engaging solely in interstate commerce since no tax has been imposed on any of the appellant's interstate shipments or any part of his receipts from that portion of his business. The tax has been imposed only on the exclusively intrastate commercial activity of transporting between points within this state in direct competition with intrastate transporters. The tax was imposed only on transportation services for which he needed no interstate permit to perform.

The tax was applied to everyone alike for performing the identical intrastate activity. It is fair, just, not discriminatory, and may not be repeated by another state.

The Mississippi sales tax law limits the imposition of the tax to exclusively intrastate transactions and therefore the issue presented to the United States Supreme Court in *Spector Motor Service* is not the same, even though both the majority and dissenting opinions support the position of the appellee in the present case.

The intrastate activity, which the Court looked for but could not find in the *Spector* case, is the total activity taxed in the present case.

The question presented in this case is obviously not the question posed by the appellant: "May the State impose a privilege tax upon the appellant solely for the privilege of engaging exclusively in interstate commerce." The facts in the case do not even approach such a question for the following reasons:

First, the Mississippi sales tax is imposed for having performed a taxable event and does not accrue until the event has been conducted.

Second, it is not a condition precedent to engaging in business.

Third, the tax is imposed only on exclusively intrastate commercial activities.

Fourth, the tax has not been imposed upon the appellant for any part of his interstate transportation services.

The sales tax levied against the appellant is in full accord with the principles established by the Supreme Courts of the State of Mississippi and the State of Washington, and the Supreme Court of the United States.

It is the contention of the appellee that the sales tax was imposed on activities of the appellant which were in intrastate commerce, since the interstate commerce had terminated at the destination of the out-of-state shipment.

The Supreme Court of the State of Washington in *Convoy* v. *Taylor*, 334 P.2d 772 (1959), in an identical case decided that the tax was properly levied and not violative of the Commerce Clause of the Constitution of the United States because it was a tax on intrastate commerce, *but even if there was a continuation of interstate commerce, the tax was proper since it was a tax on a local intrastate activity performed exclusively within that state*, and the Court cited the opinions and decisions of the Mississippi Supreme Court and the United States Supreme Court in *Interstate Oil Pipeline Co.* v. *Stone*, 337

U.S. 662 (1949), which involved local intrastate activities prior to the actual interstate shipment, and the case of *Stone* v. *Dunn Brothers,* 224 Miss. 762, 80 So.2d 802, Suggestion of Error Overruled, 350 U.S. 878 (1955), which is identical in principle to the case before this Court, which involved the imposition of the sales tax to an intrastate commercial activity at the end of the interstate movement.

In the *Interstate Oil Pipeline* case, Mr. Justice Rutledge speaking for the majority, said that it was not necessary to determine whether the appellant was engaged in interstate or intrastate commerce, because the state had the right to levy the tax anyway since it was imposed upon an exclusively intrastate, local activity, that it was fair, was not discriminatory, and could not be duplicated by another state. Mr. Justice Rutledge stated as follows in *Interstate* at 337 U.S. 666, 668:

"We do not pause to consider whether the business of operating the intrastate pipe line is interstate commerce, for even if we assume that it is, Mississippi has power to impose the tax involved in this case.

* * *

"Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax."

II. The appellant enjoys all of the rights and protection and privileges of the law afforded to all businesses. He uses the streets and highways of this state used by all transportation business alike. He is in direct competition with intrastate transporters for the business activity on which the sales tax was imposed. He needed no intrastate permit to perform this activity. The appellant had no intrastate permit because he never applied for one.

The appellant has based his sole support on the cases of *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951); *Railway Express, Inc.* v. *Virginia,* 347 U.S. 359 (1954) (*Railway Express I*); and *Colonial Pipeline* v. *Traigle,* 421 U.S. 100 (1975).

These cases may be easily and quickly distinguished from the case before this Court on the facts. The tax in each case was imposed on the sole activities of through interstate shipments. There was no local activity and therefore required an apportionment of the receipts, since they all involved a tax on interstate shipments, from a shipper in one state to a consignee in another state and was exclusively interstate commerce. The Court diligently sought the local intrastate activity in each but could not find it. They were engaged exclusively in the interstate shipments whereas in the present case, the local intrastate activity of the appellant is the only activity on which the sales tax was imposed.

The principles imposed by *Spector Motor Service, Inc., supra,* are not violated by the case at bar and the cases of *Convoy Company* v. *Taylor,* 334 P.2d 772 (Washington 1959); *Interstate Oil Pipeline* v. *Stone,* 337 U.S. 662 (1949); *Stone* v. *Dunn Brothers,* 224 Miss. 762, 80 So.2d 802, Suggestion of Error Overruled, 350 U.S. 878 (1955); *Maine* v. *Grand Trunk R. Co.,* 142 U.S. 217 (1891); *General Motors*

v. *Washington*, 377 U.S. 437 (1964); *Standard Pressed Steel Co.* v. *Washington Revenue Dept.*, 419 U.S. 560 (1975); *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653 (1948); in that the local activity which the Court sought and failed to find in *Spector* is present here and is the sole basis for the imposition of this tax.

If this Court should find that this sales tax imposed upon the local intrastate commercial activity is prohibited by the Commerce Clause of the Constitution of the United States, it would be providing an insurmountable advantage to interstate businesses who are in direct competition for the same business, and would discriminate against intrastate business, a situation never intended by the framers of the Constitution of the United States.

ARGUMENT

I. The Mississippi Sales Tax Was Not Placed Upon Appellant Solely for the Privilege of Engaging Exclusively in Interstate Commerce, but, Rather, for the Privilege of Performing Intrastate Activities Entirely Within the State of Mississippi.

The answer to the appellant's question presented to this Court may be answered easily from the facts alone. It is clear that the sales tax was not placed on the appellant solely for the privilege of engaging in interstate commerce but rather on the privilege of performing intrastate activities entirely within the State of Mississippi (App. 36).

The application of the Mississippi sales tax to the appellant's transportation charges for transporting vehicles from a shipper-owner, General Motors in Jackson, Mississippi, to a dealer also located within this state, did not violate the Interstate Commerce Clause of the Constitu-

tion of the United States (Art. I, § 8, cl. 3) for the following reasons:

The appellant's activity in Mississippi on which the sales tax was levied was an intrastate service between a point of origin and a point of destination, both of which are within the geographical boundaries of the State of Mississippi (App. 36).

Complete Auto Transit, Inc. (Complete Auto), is a Michigan corporation, engaged in transporting automobiles on waybills from General Motors in Jackson, Mississippi, as shipper, to automobile dealers both in Mississippi and surrounding states. It maintains an office, a manager, service facilities for servicing the transport trucks, and a sufficient number of personnel and transport trucks to support the business activity of handling, preparing shipments (App. 78-79), and transporting over 350 vehicles per day (App. 60-81), these facilities enjoying the full police protection of the State of Mississippi. Complete Auto holds an interstate permit (App. 32), but has no intrastate permit.[4] They could perform the intrastate activities in question here without an interstate permit and in which case the question of the burden on interstate commerce would not be presented to this Court. Complete Auto transports the vehicles on a bill of lading or waybill[5] (App. 19 and 25) which designates the shipper as General

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4. Complete has never made an application for an intrastate permit (App. 75).

5. The only facts for consideration would be the waybill or shipping document on which the appellant transported property within Mississippi which clearly established the shipper as General Motors, Jackson, Mississippi, to a dealer also located in Mississippi, and no further need for even a consideration of any interstate question. The only pertinent fact for consideration is that General Motors, either directly or by agent, shipped merchandise from themselves in Jackson, Mississippi, to a dealer located in Mississippi.

Motors in Jackson, Mississippi, to a dealer destination either in Mississippi or in a neighboring state. No Mississippi sales tax was applied to shipments from Jackson, Mississippi, to a destination outside Mississippi. The Mississippi sales tax was applied only to the activities performed under waybills which are clearly *intrastate* services. It may also be noted that no sales tax was applied to the rail transportation on bills of lading or shipping documents from outside the state to General Motors in Jackson, Mississippi.

The automobiles are shipped into Mississippi by rail on bills of lading[6] which specify the consignor as General Motors Assembly Division, Atlanta, Georgia, to themselves as consignee in care of Complete Auto, Jackson, Mississippi; General Motors, of course, having complete control over the vehicles during this rail movement by virtue of being the consignor in Georgia and the consignee in Jackson, Mississippi, and until such time as they may ship the property from Jackson, Mississippi (App. 70) to a dealer either in Mississippi or in a neighboring state.[7]

The Mississippi sales tax has been applied to the gross receipts received by Complete Auto from the charges for the services performed in transporting vehicles from General Motors, Jackson, Mississippi, to a dealer located within the state as stated on the waybill covering the movement (App. 19 and 25). It is the application of the Mississippi sales tax to appellant's charges for performing this exclusively Mississippi business that the appellant contends violates the Commerce Clause of the United States Constitution.

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6. Exhibit C-1(A) (App. 19-20).

7. See *Convoy Co.* v. *Taylor*, 334 P.2d 772 (Washington, 1959), for reason for handling shipments in this manner.

This is the same factual and legal situation decided by the Supreme Court of the State of Washington in *Convoy Company* v. *Taylor*, 334 P.2d 772, and identical in principle to *Stone* v. *Dunn Brothers*, 224 Miss. 762, 80 So.2d 802, originally *McKeigney* v. *Dunn Brothers, Inc.*, 224 Miss. 762, 80 So.2d 802 (1955), suggestion of error overruled 81 So.2d 712 (1955), 350 U.S. 878 (1955).

The facts clearly establish that the appellant is engaged in intrastate business activities, but, even if they are engaged in a continuation of interstate commerce, the tax does not violate the Commerce Clause because it is a tax on a local, exclusively Mississippi business activity performed by the appellant. This aspect will be discussed later in this Brief.

The Mississippi sales tax was imposed upon the activities of the appellant for the privilege of selling and performing transportation services exclusively within this state on waybills which are identifiable and easily separable from any waybills for transportation from Jackson, Mississippi, to another state and on which no sales tax was assessed or collected. The shipment by rail from the General Motors assembly plant in Georgia to General Motors in Jackson, Mississippi, is interstate commerce and no sales tax has been assessed or collected on the services for this movement. The automobiles are then massed at the destination point of the shipment and this concludes the interstate movement. There was no through bill of lading connected with any of the activities in question.

Interstate commerce must have a clear point of beginning and a point of termination and when the property reaches the consignee, General Motors in Jackson, Mississippi, this concludes the interstate movement. The factual situation as to shipments by General Motors in Jack-

son, Mississippi, to points either inside the State of Mississippi or outside the State of Mississippi must determine whether interstate or intrastate activities are then involved.

The question presented here is no different from a situation where a merchant located in Mississippi takes orders from customers, orders the merchandise from the factory, has the merchandise sent to his place of business, then ships the merchandise by common carrier to the customer. This is a common practice and certainly no contention is made by the carrier that he should not be assessed with the sales tax on the transportation charges because the merchandise was manufactured and shipped to the merchant from another state. A great majority of all merchandise falls in this category and to accept the appellant's theory would place an insurmountable, impossible task upon the states in their attempt to reconcile the business of the carrier, to determine which of their shipments is interstate and which is intrastate.

The services of Complete Auto on which the Mississippi sales tax was assessed were business activities conducted totally and exclusively within the State of Mississippi and performed in direct competition with Mississippi transporters who were subject to and paid the sales tax on identical services. The fact that Complete Auto did not apply for and obtain an intrastate permit should not relieve them of the liability of the sales tax levy for conducting an intrastate service performed exclusively within the State of Mississippi in direct competition with intrastate business and the appellant may not take advantage of intrastate competitors by attempting to hide behind the veil and pretext of an exemption that they cannot be assessed the tax because they are engaged exclusively in interstate commerce. They are in direct competition for the business to exploit the Mississippi trade

market, and the tax imposed no burden upon interstate commerce that was not assumed by all other transporters competing for the same business.

This case is identical to the case of *Convoy Co.* v. *Taylor*, 334 P.2d 772 (Washington, 1959). The only difference is that Ford Motor Company was the manufacturer and Convoy was the transporter, and Convoy had applied for and received an intrastate permit to transport within the State of Washington. The attempt by the appellant to distinguish the two cases had to do with the unloading of the vehicles at the rail site in Jackson, Mississippi. The actual mechanics of the unloading is unimportant because it is apparent that the vehicles were received at Jackson by General Motors or their agent because no one else could accept the property except the person to whom they are shipped or their agent. At any rate, they were received because they were subsequently shipped via Complete Auto by General Motors as shipper in Jackson, Mississippi, to a dealer located either within or without the state. Ford officials testified that they maintained possession and control of the automobiles until shipped out of Seattle by Convoy. This is precisely the same factual situation present in the case before this Court.

The case of *Stone* v. *Dunn Brothers, supra,* is also precisely on point, the only difference being that Tennessee Gas Transmission Company was shipping pipe instead of automobiles. The transactions were identical. Pipe was shipped on a bill of lading from the owner as consignor in California to themselves as consignee in Jackson, Mississippi. By separate waybill Dunn Brothers transported the pipe from Tennessee Gas Transmission Company in Jackson to sites along a right-of-way. The Mississippi Supreme Court held that this was intrastate commerce.

The Supreme Court of the State of Washington in affirming the sales tax levy indicated they considered this transaction as being one of intrastate commerce, but continued that it was not necessary to decide because the tax was properly levied without burdening interstate commerce, since it was a sales tax on a local business activity conducted within the State of Washington.

II. The Incidence of the Mississippi Sales Tax Is Not Upon the Privilege of Engaging Exclusively in Interstate Commerce but Rather Upon the Performing of Local Activities, Namely, the Sale and Performance of Transportation Services, Exclusively Within the State of Mississippi.

Even though the Mississippi sales tax is labeled a privilege tax, the sales tax is levied for selling and performing local transportation services and is required to be passed on to the consumer of the goods and services, the total activity or transaction occurring exclusively within the state. There could be no other reasonable interpretation. The Mississippi sales tax is not a condition precedent to doing business. The tax does not attach until the local activity is performed; the amount of tax is measured directly by the gross amount of the charge for the service which was performed. If there is no sale and performance of the distinctive local service, no tax is levied. Therefore, no sales tax is levied for the privilege or right to engage in any activity, only a tax for having conducted a sale of tangible personal property or a local service.

In this particular instance, the local service sold and performed was the charge for transportation services between a point of origin and a point of destination, both points located within the state. Any question concerning the two points within the state possibly being interpreted

as a point of entry and the point of departure for a through shipment may quickly be dispelled since the statute is directed to the sale and performance of transportation service conducted exclusively within this state, a distinctive and separate commercial transaction, for the performance of a specific business activity to be conducted entirely within the state.

To complete the proof that the sales tax was not levied solely for the privilege of conducting exclusively interstate commerce, there is the fact that no Mississippi sales tax was levied on any part of Complete Auto's receipts for services performed in interstate shipments (on transportation charges for transporting vehicles from Jackson, Mississippi, to dealers located in another state). Had the Mississippi sales tax been levied for the privilege of engaging exclusively in interstate commerce, the Mississippi sales tax would have been levied upon Complete Auto's total gross receipts from all transportation services from Jackson, Mississippi, to points both within and without the state. The tax was applied only to their intrastate sales and services. There is no question of apportionment of a tax or receipts.

The Mississippi sales tax could not be levied on through interstate shipments because there would be no local taxable activity, specifically, no sale of a transportation service being made and performed exclusively within this state. Therefore, the conclusion drawn by appellant, who apparently relied upon the *Spector Motor Company* case, *infra*, that the tax is upon the privilege of engaging in exclusively interstate commerce is obviously erroneous.

It is a well established principle of this Court that when a business is performing both interstate and intrastate business, a privilege tax may be imposed on the intrastate business. *Spector Motor Service, Inc.* v. *O'Con-*

nor, 340 U.S. 602 (1951); *Memphis Natural Gas* v. *Stone*, 335 U.S. 80 (1948); *International Harvester Co.* v. *Evalt*, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390 (1947).

The activity engaged in by the appellant, for which it received compensation upon which the tax in question was computed and paid, consisted wholly and only of transporting trucks on a waybill from a consignor at a point of origin to a consignee at a point of destination, this intrastate commercial event being the exact business on which the tax was levied and paid. *Interstate Oil Pipeline Co.* v. *Stone*, 337 U.S. 662-682 (1948).

III. Mississippi Sales Tax Levied on the Gross Receipts of Transportation Charges Received for Transporting Vehicles From a Consignor-Owner to Consignee, Both Within the State of Mississippi, Is Not an Invalid Imposition Upon Interstate Commerce Even If It Was a Continuation of an Interstate Movement.

The conclusion drawn by appellant that the Mississippi Supreme Court found that the activities engaged in by Complete Auto were exclusively interstate commerce is clearly erroneous. It is abundantly clear that the Mississippi Court found it unnecessary to determine the question of interstate or intrastate commerce since they specifically found that the incidence of the tax was the performance by appellant of the local business activity, performed exclusively within the State of Mississippi. This is established precisely by the Court's statement of the question before the Court: Whether the gross income derived by taxpayer from transporting automobiles from Jackson, Mississippi, to other points in the State of Mississippi is taxable by the state. *Convoy Company* v.

Taylor, supra; *Interstate Oil Pipeline Co.* v. *Stone, supra*; *Stone* v. *Dunn Brothers, supra.*

The State of Mississippi has recognized that shipments on a bill of lading from a consignor in one state to a consignee in another state is interstate commerce and no Mississippi sales tax has been levied on transportation charges provided for such services.

We also recognize that it is sometimes difficult to determine the precise line of the transition from interstate to intrastate commerce but in this case you have a much clearer and more definitive situation as established by the documents in evidence conclusively establishing the termination of interstate commerce in Jackson, Mississippi.

The local activities involved prior to shipping and local activities after arrival at a destination should therefore be considered and regarded in the same light as other local activities, and treated exactly alike with regard to the taxation of identical local services.

This is the sound, basic, and logical reasoning that has been applied by this Court for many years. It is a well-settled rule as indicated by this Court's decisions that when the incidence of the tax is placed upon a local activity and not upon the privilege to engage exclusively in interstate commerce, that the imposition of a sales tax based on the gross receipts received from the performance of the local service does not impose a burden on interstate commerce if the tax is fair, equitable, nondiscriminatory, and cannot be repeated by any other state.

The prevention of discrimination against interstate commerce does not impute nor imply that favoritism should be granted to it in the performance of local business activities or services applicable to competitors. *McGoldrick* v. *Berwin-White Coal Mining Co.*, 309 U.S. 33 (1940).

It is also a well-recognized principle of this Court by numerous decisions holding that interstate commerce should pay its own way. *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250 (1938); *Northwestern States Portland Cement Co.* v. *Minn.,* 358 U.S. 450 (1959).

This case has been based upon decisions of other state courts and upon the principles laid down by the United States Supreme Court in cases as closely related in point of facts and law as could possibly be found.

IV. The Mississippi Sales Tax Applied to Appellant's Business Activities Was Not Discriminatory, the Tax Cannot Be Duplicated by Another State, and the Burden of the Tax Was on the Mississippi Consumer of the Services.

A. The appellant maintains and operates a large business activity in Jackson, Mississippi. They are in direct competition with intrastate transporters for transportation services. They are afforded all of the rights, privileges, and protection of Mississippi law provided other competitive businesses. They use all of the streets and highways of the state used by other intrastate transporters and are afforded full police protection of the state. They were placed under no restrictions which were not applicable to all alike. The State of Mississippi exacted a sales tax only from business transactions and activities conducted entirely within this state and the tax was assessed uniformly and without exception.

B. No other state can duplicate the tax and there can be no fear of multiplicity of taxation because the total taxable event was conducted entirely within this state.

When a sale can be localized completely in one state, there is no danger of multiple taxation, and, as in the case of a retail sales tax, the state may use as its tax base the total gross receipts arising within its borders. *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33, 84 L.Ed. 565, 60 S.Ct. 388, 128 A.L.R. 876 (1940).

Any fear of duplication may be entirely dispelled in this case because the total business transaction occurred within this state. It is a tax on a specific intrastate transaction and there is no question of apportionment involved.

We must begin with the proposition that it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of the state tax burden even though it increases the cost of doing business. *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250, 254, 82 L.Ed. 823, 827, 58 S.Ct. 546, 115 A.L.R. 944 (1938).

Should the Court decide that the tax herein was improper, intrastate commerce would be the victim of discrimination[8] and such a decision would place upon intrastate commerce an intolerable competitive burden.

C. The appellant has not shown that the tax was discriminatory or that intrastate transporters were favored or received any advantages not afforded Complete Auto.

D. By statute, Section 10146-06, Mississippi Code of 1942, now Section 27-76-11, Mississippi Code of 1972, the vendor of the services is directed to collect the sales tax and pass it to the customer by adding to the gross receipts or income for the performance of the service the five

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8. In the General Laws of Mississippi of 1972, Chapter 506, Section 10109(2), Mississippi Code of 1942, was amended by the Mississippi State Legislature to repeal the 5% sales tax on the intrastate transportation of personal property.

percent Mississippi sales tax. Therefore, Complete Auto does not bear the burden of the tax. It is charged to and collected from the recipient of the service and the total charge for service and tax is collected from the customer. It is readily ascertainable that the total charges are then billed to and paid for by the resident Mississippi automobile dealer who is the local recipient of the services.

Even though it is unimportant and has no legal bearing on the matter, it is interesting to note that the tax in question would amount to only five percent of the transportation charges. This charge, as indicated on the waybills of Complete Auto from Jackson, Mississippi, to a dealer also located in Mississippi, is approximately $30, and therefore the Mississippi sales tax on the average automobile transported would be approximately $1.50.

V. Cases Cited by Appellant As Support for Their Argument Are Inappropriate and Are Inapplicable to the Facts of the Present Case, but, in Fact, Directly Support the Contention of Appellee That the Intrastate Business Activities May Be Subject to the Mississippi Sales Tax.

The appellant has based its entire case solely on *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 609 (1951). Even though that case has been highly criticized and there was very strong and forceful dissent by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Clark, we actually find no fault with Spector as far as the present case is concerned. Actually, the Mississippi sales tax has been applied in strict accordance therewith, and *Spector* manifestly supports the contention of appellee that the levy of a sales tax on the local commercial activities is not a burden on interstate commerce.

A quick analysis of *Spector* substantiates the fact. In that case the tax was upon a franchise for the privilege of doing business. Spector's principal place of business was in Illinois. It was authorized by the Interstate Commerce Commission to do certain interstate trucking and by the Connecticut Public Utilities Commission to do part of such interstate trucking in Connecticut. It had not been authorized by the State of Connecticut to do intrastate trucking and *did not engage in it.* Petitioner's business was the *interstate transportation of freight by motor truck between east and west* on through bills of lading. When a full truckload was to be shipped to or from a customer in Connecticut, petitioner's over-the-road trucks go directly to the customer's place of business. In the case of less than truckload shipments, pickup trucks operated by the petitioner, gathered the freight from customers for assembly into full truckloads at either of two terminals maintained within the state. The pickup trucks merely acted as a part of the interstate transportation of the freight.

The tax did not discriminate between interstate and intrastate commerce. Neither the amount of the tax nor its computation was in question.

There are very distinct and basic differences in *Complete Auto* and *Spector*.

1. *Spector* involved a franchise tax for the privilege of carrying on or doing business in the state.

2. Spector was only doing interstate business. The shipments they carried were from a consignor at a point in one state to a consignee in another state. They did no intrastate hauling and therefore were conducting no local business of an intrastate character.

Since the tax was on a franchise for the privilege of doing business in Connecticut, and Spector was only shipping goods from a consignor in one state to a consignee in another state, they were actually engaged only in interstate commerce. Unlike *Spector*, the case of *Complete Auto* presents the opposite situation:

1. The Mississippi sales tax was levied on a business transaction performed exclusively intrastate on a waybill from a consignor-owner in Jackson, Mississippi, to a consignee also located in Mississippi.

2. No Mississippi sales tax was applied to any of Complete Auto's interstate transactions such as those in which Spector was totally engaged. Specifically, those shipments, from a consignor in one state to a consignee in another state, which are interstate in character were not taxed. No Mississippi sales tax was levied on any of Complete Auto's interstate shipments from Jackson, Mississippi, to a destination in another state.

In *Spector*, there was full agreement between the parties that the Connecticut franchise tax was placed upon the corporation for the privilege of carrying on or doing interstate business in the state.

In the case of *Complete Auto*, the Mississippi sales tax is levied for performing exclusively intrastate commercial business which is the exact opposite. The Mississippi sales tax is a tax levied on the sale of goods and services performed exclusively within the state, and the law further provides that the tax be passed to the consumer.

The Mississippi sales tax is not a license, nor a franchise. It does not attach until the intrastate sale or service is made; therefore it is not a prerequisite for doing business. If there is no sale of goods or services performed totally within the state there is no tax due. The

incidence of the tax is upon the intrastate sale. The movement of interstate commerce from one state to another could not be taxed under the provisions of the Mississippi sales tax law, since the tax applied only to intrastate commercial transactions, such as those engaged in by Complete Auto in direct competition with other intrastate transporters.

The ruling of the United States Supreme Court in the *Spector* case therefore would be appropriate and applicable only if Mississippi sought to levy a sales tax on shipments by Complete Auto from Jackson, Mississippi, to a destination in another state. Since this is forbidden by the *Spector* case as a tax on interstate commerce, no levy was assessed or collected on these transactions.

The same basic infirmity is readily ascertainable in the second case the appellant relies upon. *Colonial Pipeline Co.* v. *Traigle, Collector of Revenue of Louisiana*, 421 U.S. 100 (1975). That case also was a franchise tax upon the privilege of carrying on within a state certain activities, related to a corporation's operation of an interstate business.

This case may be disposed of quickly, since it is inapplicable to the case before this Court for the same reasons stated in *Spector* above. The incidence of the tax in *Colonial* was the engagement in exclusively interstate transactions not on a local, commercial sale or activity, whereas Complete Auto on the other hand is engaged in local intrastate commercial sales or services. Unlike Complete Auto, Colonial was engaged only in the interstate shipment of oil and there were no intrastate sales involved. They had no administrative officers in Louisiana and therefore were in fact conducting no exclusively intrastate activities.

The third and last case, *Railway Express, Inc.* v. *Virginia*, 347 U.S. 359 (1954), relied upon by the appellant for support is afflicted with the same basic deficiency in attempting to relate the facts and law to the present case.

This case involved an annual privilege license to do business within the State of Virginia and a tax levy measured by gross receipts from that portion of interstate operations apportioned to Virginia. The state denied Railway Express the privilege of engaging in intrastate business and Railway Express formed a separate corporation to conduct their intrastate commercial business activities, and that part of the business (comparable to Complete Auto in this case) in the present case is not in question. The state, under a separate and detailed system of taxation for *express companies*, then placed a tax on the privilege of engaging in a business, measured by Virginia's *proportionate* share of the interstate business which they conducted.

Since Railway Express had previously removed from consideration in the litigation that part of its activities specifically conducted in intrastate business transactions, the only business they were performing when the case was brought before the court was exclusively interstate shipments, from a consignor in one state to a consignee in another state. The court therefore held this to be an invalid imposition on the Commerce Clause because the tax was levied on the privilege of engaging in interstate commerce.

The only reference necessary to distinguish *Railway Express* from *Complete Auto* is that the sales tax levied against Complete Auto is for the performance of the same activity that was conducted by the separate corporation

formed by Railway Express, to perform its intrastate commercial activities and was not at issue.

The case before the Court in *Railway Express* concerned only the interstate business comparable to Complete Auto's interstate shipments upon which no Mississippi sales tax has been applied.

In view of the fact that appellant has relied solely upon *Spector*, *Colonial*, and *Railway Express* for their total support and all of these cases being inappropriate and inapplicable to support their contention since they specifically involved taxation pertaining to direct interstate shipments (from a consignor in one state to a consignee in another state), there should be no question remaining. As a matter of fact, the cases are strong support for the position of the appellee that the local commercial business activities, absent in the above cases but totally taxable events herein may be taxed, and the issue should be put to rest.

VI. The Mississippi Supreme Court Correctly and Accurately Found That the Tax Was Properly Levied and Did Not Violate the Commerce Clause of the Constitution of the United States (Art. I, § 8, Cl. 3) and Based Their Decision Upon the Following Cases.

In *Convoy Company* v. *Taylor*, 334 P.2d 772 (1959), the tax involved arose from the following method of transportation of Ford automobiles: The Ford Motor Company maintained an assembly plant in Richmond, California, from which it supplied cars to its dealers in western states, including Washington. A Washington dealer submitted an order to Ford's district sales representative in Seattle, designating the model and specifications of the automobile

desired. These orders, assembled in the sales office, were forwarded to the Ford assembly plant in California. As soon as the body was placed on the chassis, the dealer's name was placed on the windshield of the ordered unit and was attached to the automobile throughout the process of its assembly. The completed unit was then shipped to the dealer by the following method of transportation: The ordered automobiles were loaded in a railroad car at Richmond, California. The Ford Motor Company, as consignor, prepared a non-negotiable, uniform, straight bill of lading with itself, "Ford Motor Co., c/o Convoy Co., Seattle, Wn.," as consignee. The bill of lading contained a detailed description of each vehicle, together with the name of the ordering dealer, and the city in which he was located. At the same time, Ford Motor Company prepared invoices for each dealer showing his location, the type and model of vehicle, and the total charges to be collected upon delivery of the vehicle.

The Ford Motor Company forwarded the bills of lading and dealer invoices to the plaintiff. Upon arrival of the rail car at plaintiff's spur track in Seattle, plaintiff unloaded the automobiles; prepared freight bills to cover the truck portion of the movement, at rates stated in the company's interstate tariff; loaded the units on its truck equipment; and delivered the designated motor vehicles to the respective Ford dealers, as shown on the original bill of lading. No joint through-rates were in effect for rail-truck shipments of motor vehicles between the geographic points involved. The Ford Motor Company paid both the rail and truck transportation charges. Convoy Company was assessed a tax by the State of Washington on revenue derived from the transportation of new automobiles for the Ford Motor Company from Seattle, Washington, to Ford dealers in other Washington cities.

The Supreme Court of Washington held that the assessment of the tax did not contravene the interstate commerce clause of the United States Constitution because that portion of the transportation of the automobiles from the railroad depot in Seattle, Washington, to other cities in Washington constituted intrastate commerce. The Court said:

"The trial court's ultimate conclusion—that the tax imposed by RCW 82.16.020 on plaintiff's gross operating revenue derived from its transportation of automobiles from its spur track siding in Seattle to Ford dealers within the state of Washington does not contravene the limitations of the commerce clause of the Federal constitution, art. 1 § 8, cl.3—is sustained by either of two reasons: plaintiff's operation is purely one of intrastate commerce; or, the tax is not an invalid imposition on interstate commerce in the circumstances of the instant case.

"Diligence of counsel has directed our attention to a multitude of decisions in which the questions presented are discussed. To analyze all of the authorities would not clarify the situation, for, after reviewing them, we are impressed with the fact that

> " 'The wording of a judicial declaration of the precise line that marks the change from intrastate movement to interstate movement has been difficult.' (Dis. op.) Interstate Oil Pipe Line Co. v. Stone, 1949, 337 U.S. 662, 672, 69 S.Ct. 1264, 1269, 93 L.Ed. 1613.

"That plaintiff's operation in the state of Washington, as we have described it, is intrastate commerce, is sustained by the recent decision of the supreme court of Mississippi in McKeigney v. Dunn Brothers, Inc. (originally Stone v. Dunn Brothers, Inc.), 1955, 224 Miss. 762, 80 So.2d 802, 807; 224 Miss. 777, 81 So.2d 712.

"Tennessee Gas Transmission Company, which was laying a pipeline in Mississippi, purchased pipe in California. The Transmission Company, as consignor, shipped the pipe by railroad to itself, as consignee, for delivery at various railheads or depots in Mississippi. Bills of lading were issued accordingly. The Transmission Company had contracted with Dunn Brothers, a motor carrier operating under a certificate from the interstate commerce commission, to deliver the pipe from the depots to various points within the state.

"When the shipment arrived at its destination, the Transmission Company, by an agent, inspected it for damage in transit. Dunn Brothers then took possession of the shipment from the railroad and delivered it as instructed. The court held that '[t]his was, in effect, a delivery to the Transmission Company. The interstate journey was then at an end.'

"Mississippi assessed a two per cent tax, similar to the tax in the instant case, against Dunn Brothers' gross income realized from the operation described. The tax was held to be valid. The court said:

> " 'It is only for the carriage within Mississippi that the tax is demanded. A local drayman or an intrastate carrier would have been obliged to pay the tax here demanded. If, under the circumstances of this case, appellee should prevail, then by reason of its claim of interstate commerce, it would escape the burdens which fall on its competitors in intrastate commerce. Evidently equality for, not favoritism to, interstate commerce was the underlying purpose of Article 1, Section VIII, cl. 3, of the U. S. Constitution.'

"The court concluded:

> " 'So, the service by Dunn Brothers in carrying the pipe, after its acceptance by the Transmission Company, from depot or railhead in Mississippi to the right of way also in Mississippi, was an activity wholly within the state of Mississippi, *was therefore intrastate*, and the gross income therefrom was subject to the tax of two per cent. However if it may be said that this was a fringe situation and therefore uncertain, nevertheless the appellee is still liable for this tax as a recompense for the protection which it was afforded by the state as it engaged in this activity. Thus, for both reasons, as above stated, the tax was properly assessed and collected.' (Emphasis theirs.)

"On appeal to the United States Supreme Court, the Dunn Brothers' case was dismissed for 'want of a substantial federal question.' 1955, 350 U.S. 878, 76 S.Ct. 139, 100 L.Ed. 775.

"We note that the Mississippi court alluded to a conclusion similar to our second reason for deeming the tax a valid one—that it is not an invalid imposition on interstate commerce.

"Support for this conclusion is found in the rationale expressed in Interstate Oil Pipe Line Co. v. Stone, 1949, 337 U.S. 662, 69 S.Ct. 1264, 93 L.Ed. 1613, and cases cited. The facts are adequately set forth in the syllabus of the opinion, as follows:

> " 'Appellant owns and operates pipe lines used to transport oil from lease tanks to railroad loading racks in Mississippi. Delivery of the oil to appellant by the owner is accompanied by instructions for shipping it interstate. The oil is pumped from the loading

racks into railroad tank cars; and, if no tank cars are available, it is stored, but never longer than a week. In the bills of lading, which covered only the rail shipment, the owner is designated as shipper and appellant as his agent, and the out-of-State destination is indicated. Mississippi levied against appellant a tax measured by appellant's receipts from the transportation of the oil from the lease tanks to the loading racks.'

"A majority of the court held that the tax was valid. Mr. Justice Rutledge, with whom three other members of the court agreed, said:

" 'We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce for, even if we assume that it is, Mississippi has power to impose the tax involved in this case. * * *

" 'The statute is not invalidated by the commerce clause of the Federal Constitution merely because, unlike the statute attacked in Memphis [Natural] Gas Co. v. Stone, supra [335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832], it imposes a "direct" tax on the "privilege" of engaging in interstate commerce. Any notions to the contrary should not have survived [State of] Maine v. Grand Trunk R. Co., 142 U.S. 217, 12 S.Ct. 121, 163, 35 L.Ed. 994, which flatly rules the case at bar. That case sustained a state statute which imposed upon an interstate railroad corporation "an annual excise tax [measured by apportioned gross receipts], for the privilege of exercising its franchises in this State." The Grand Trunk decision has been approved by this Court as recently as the other controlling case of Central Greyhound Lines [of New

York, Inc.] v. Mealey, supra, 334 U.S. [653] at pages 658, 663, 68 S.Ct. [1260], at pages 1263, 1266, 92 L.Ed. 1633, in which the Court permitted New York to impose a tax on the gross receipts from the operation of an interstate bus line, provided that tax was apportioned according to mileage traveled within the state.'

"The concluding paragraph of Mr. Justice Rutledge's opinion is of particular significance to the case before us.

" '*Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax.*' (Emphasis added)

"Mr. Justice Burton concurred in the result on the ground that the tax was levied against intrastate commerce.

"We conclude, therefore, that the judgment must be affirmed.

"It is so ordered."

In *Stone* v. *Dunn Brothers*, 224 Miss. 762, 80 So.2d 802 (1955), the Mississippi Supreme Court held that the service of a motor carrier in delivering pipe, shipped by rail from another state to Mississippi, after its acceptance by the buyer from the railroad in Mississippi, to the buyer's pipe line right of way also in Mississippi, was activity conducted wholly within the State of Mississippi, and therefore intrastate commerce, and gross income derived

therefrom was subject to state sales tax. The court used the following applicable language:

"In Interstate Oil Pipe Line Company v. Stone, 203 Miss. 715, 35 So.2d 73, 78, 36 So.2d 142, which had under consideration Sections 10105 and 10109, Code of 1942, Annotated, though a different paragraph of Section 10109, supra, it was held that the tax there involved was on income derived from the transportation of oil by the pipe line from wells to shipping points and for pumping the oil into tank cars for shipment by rail out of the state. The opinion quoted from 11 Am.Jur., Commerce, Section 28, p. 28, as follows: ' 'It is not within the power of the parties by the form of their contract to convert what is exclusively a local business, subject to state control, into an interstate business, protected by the commerce clause."' The quotation from the text was documented by Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622; Superior Oil Co. v. Mississippi, 280 U.S. 390, 50 S.Ct. 169, 74 L.Ed. 504; Browning v. Waycross, 233 U.S. 16, 34 S.Ct. 578, 58 L.Ed. 828. The opinion also cited 15 C.J.S., Commerce, §§ 18-25, pp. 278-291, to the same effect. The Court observed that 'the oil was not committed by the owner to this pipe line company for transportation to another state, but to be transported to the railroad and there loaded into tank cars.' The opinion then cited Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715, to show that the carrying of articles in carts or other vehicles to the depot, where the journey is to commence, is no part of the journey; and likewise the carrying of articles from the farm or forest to the depot is only an interior movement.

"On the Pipe Line's appeal the Supreme Court of the United States affirmed. Interstate Oil Pipe Line v. Stone, 337 U.S. 662, 69 S.Ct. 1264, 1266, 93 L.Ed. 1613.

"Four of the justices in an opinion written by Justice Rutledge said: 'We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce for, even if we assume that it is, Mississippi has power to impose the tax involved in this case. Further, we do not find it necessary to dispute that the Supreme Court of Mississippi construed the statute as imposing a tax on the privilege of operating a pipe line wholly within the state, and not a tax solely upon the "local activities of 'maintaining, keeping in repair, and otherwise in manning the facilities' " situated in Mississippi, Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 92-93, 68 S.Ct. 1475, 1481, 92 L.Ed. 1832 [1842, 1843], or upon the gross receipts themselves, Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633. While we are of course bound by the construction given a state statute by the highest court of the State, we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels.' The opinion also said: 'Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax.' Justice Burton concurred in the result on the ground that the imposition 'was a tax on the privilege of operating a pipe line for transporting oil in Mississippi in intrastate commerce and that, as such, it was a valid tax.' Justice Reed in the dissenting opinion, among other things, observed that 'An interstate journey must have a beginning and an end. Common

sense rejects an extension of the journey to the traveler's front door or the producer's farm or factory when no through order for carriage is in effect. The exact limits of interstate commerce in such fringe situations are uncertain. * * * this Court has interpreted the commerce clause to permit state nondiscriminatory taxation for the use of state facilities, upon the property used in interstate commerce, upon production for commerce, and upon net proceeds therefrom. Through such taxes, the states may exact payment for their protection and encouragement of commerce. Joseph v. Carter & W. Stevedoring Co., 330 U.S. 422, 429, 67 S.Ct. 815, 819, 91 L.Ed. 993 [1001], and cases cited.'

"*The only factual difference between the case of Interstate Oil Pipe Line* v. *Stone, supra, and the case now before the Court is that, in that case, the tax on income was derived from the transportation of oil from wells to the shipping points and pumping the same into the tank cars for shipment by rail out of the state—at the beginning of the journey—whereas the tax here was imposed on income which was derived from hauling pipe from the railhead to the right of way—at the end of the journey.* (Emphasis added)

"In Stone v. Memphis Natural Gas Co., 201 Miss. 670, 29 So.2d 268, 270, the appellee was held to be liable for the state franchise tax, although its business was solely and exclusively interstate, and it was not engaged in any intrastate business. The Court said that the franchise tax was not one upon 'doing business' as that term is ordinarily understood. The opinion pointed out that there was 'no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities

which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State.'

"On the Gas Company's appeal, the decision of this Court was affirmed by the Supreme Court of the United States. Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832. Three of the Justices held that the tax, under the construction of this Court, was additional recompense for protection of the pipe line's local activities, and could not therefore be regarded as one on the privilege of doing interstate business; that the activities taxed were not under the protection of the commerce clause; and that the burden of such tax was no more unreasonable than the permissible ad valorem tax. A fourth Justice held that the tax was within the territorial limits of the state's taxing power; that it placed no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; that it did not undertake to tax interstate activities carried on outside of the state's border; and that it could not be repeated by another state. The fifth Justice concurred in the result.

"The language of Justice Reed, in his dissenting opinion in Interstate Oil Pipe Line Company v. Stone, supra, namely, that 'an interstate journey must have a beginning and an end', must be kept in mind; likewise the opinion of the Supreme Court in Coe v. Errol, supra, that the carrying of articles in cars or other vehicles to the depot, where the journey is to commence, is no part of the journey; and that the carrying of articles from the farm or forest to the depot is only an interior movement. Again, the language of Justice Reed, in his dissent-

ing opinion, supra, should be recalled, namely, that 'common sense rejects an extension of the journey to the traveler's front door or the producer's farm or factory when no through order for carriage is in effect.' He again well said that 'the exact limits of interstate commerce in such fringe situations are uncertain.'

"If the above reasoning is followed, the journey in interstate commerce in this case began at the railroad's depot in the State of California. The transportation of the pipe from the foundry to the depot was only an interior movement. The Transportation Company was the shipper. It consigned the shipment from a point in California to itself at a point in Mississippi. The railroad company, the interstate carrier, issued its bill of lading to the Transmission Company, as both consignor and consignee, showing its agreement to deliver the shipment from a depot in California to a railroad depot, or railhead in the State of Mississippi. When the shipment arrived at its destination, the Transmission Company, by an agent, inspected and accepted it. Following this acceptance, Dunn Brothers took over the shipment from the railroad. This was, in effect, a delivery to the Transmission Company. The interstate journey was then at an end. The railroad company, the interstate carrier, had agreed to deliver the shipment from a point in California to a point in Mississippi, and this agreement of carriage had been fully performed. The Transmission Company then engaged another carrier, a motor carrier, Dunn Brothers, to deliver the shipment from the depot, or railhead, along its right of way; and the fact that this procedure had been agreed upon, prior to the railroad's delivery, did not change the essential features of the activity. *Nor did the fact that Dunn Brothers held a certificate as a carrier for interstate commerce grant it immunity, when it was carrying intrastate*

commerce exclusively. It is only for the carriage within Mississippi that the tax is demanded. A local drayman or an intrastate carrier would have been obliged to pay the tax here demanded. If, under the circumstances of this case, appellee should prevail, then by reason of its claim of interstate commerce, it would escape the burdens which fall on its competitors in intrastate commerce. Evidently equality for, not favoritism to, interstate commerce was the underlying purpose of Article I, Section VIII, cl. 3, of the U. S. Constitution.

"The case of Gross Income Tax Division v. J. L. Cox & Son, 227 Ind. 468, 86 N.E.2d 693, 10 A.L.R.2d 642, from the Supreme Court of Indiana, is directly in point.

"The case of American Express Co. v. Miller, 104 Miss. 247, 61 So. 306, 45 L.R.A., N.S., 120, is not in point. In that case, the packages were delivered by the liquor dealers in Louisiana to the boats, and the masters issued bills of lading for the entire journey, across the state line, to the customers in Mississippi, collecting at the time the charge for the completed transportation, with no opportunity or right of the original shipper thereafter to accept or control the shipment. The transportation was continuous from the shipper to the consignee. (Emphasis added)

. . . "Interstate transportation should bear a fair share of the cost of the local government whose protection it enjoys. Many decisions of the Supreme Court of the United States show that, so far as the commerce clause is concerned, state taxes may be validly laid on corporations which carry on local activities sufficiently separate from interstate commerce, even though such taxes amount to the same as if levied on the interstate business itself. Independent Warehouses v. Scheele, 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346; McGoldrick v. Berwind-White Coal Min. Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128

A.L.R. 876; Ford Motor Co. v. Beauchamp, 308 U.S. 331, 60 S.Ct. 273, 84 L.Ed. 304; Southern P. Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586; Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 58 S.Ct. 736, 82 L.Ed. 1043; Utah Power & L. Co. v. Pfost, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038; Western Cartridge Co. v. Emmerson, 281 U.S. 511, 50 S.Ct. 383, 74 L.Ed. 1004, Hump Hairpin Mfg. Co. v. Emmerson, 258 U.S. 290, 42 S.Ct. 305, 66 L.Ed. 622; and American Mfg. Co. v. St. Louis, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084. See also Stone v. Stapling Machines Co., Miss., 71 So.2d 205, which the Supreme Court of the United States refused to review. See also Mavar Shrimp & Oyster Co., Ltd. v. Stone, Miss., 73 So.2d 109.

"So, the service by Dunn Brothers in carrying the pipe, after its acceptance by the Transmission Company, from the depot or railhead in Mississippi to the right of way also in Mississippi, was an activity wholly within the State of Mississippi, was therefore intrastate, and the gross income therefrom was subject to the tax of two per cent. However, if it may be said that this was a fringe situation and therefore uncertain, nevertheless the appellee is still liable for this tax as a recompense for the protection which it was afforded by the state as it engaged in this activity. Thus, for both reasons, as above stated, the tax was properly assessed and collected. Hence the judgment of the trial court is reversed, and a judgment will be entered here for the appellant.

"Reversed and judgment here for appellant."

In *Interstate Oil Pipe Line Company* v. *Stone*, *supra*, the Court said:

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and

interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. Interstate Oil Pipe Line Co. v. Stone, supra; International Harvester Co. v. Evatt, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390; Atlantic Lumber Co. v. Com'r of Corporations and Taxation, 298 U.S. 553, 56 S.Ct. 887, 80 L.Ed. 1328. *The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, Central Greyhound Lines* v. *Mealey, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633,* or the publication of a newspaper, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823. See also, Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832." (Emphasis added.)

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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